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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 **CARL D. SIMMONS,**  
12 **CDCR #E-96088**

13 **Plaintiff,**

14 **vs.**

15 **PEOPLE OF THE STATE OF**  
16 **CALIFORNIA, et al.,**

17 **Defendants.**

Civil No. 08-1308 IEG (BLM)

**ORDER SUA SPONTE DISMISSING  
FIRST AMENDED COMPLAINT AS  
FRIVOLOUS PURSUANT TO  
28 U.S.C. § 1915(e)(2)(B)(ii)  
AND § 1915A(b)(1).**

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20 **I. Procedural History**

21 On July 17, 2008, Plaintiff, a state inmate currently incarcerated at Calipatria State Prison,  
22 located in Calipatria, California and proceeding pro se, filed a civil rights Complaint pursuant  
23 to 42 U.S.C. § 1983. Plaintiff did not prepay the \$350 filing fee mandated by 28 U.S.C.  
24 § 1914(a) to commence a civil action; instead, he filed a Motion to Proceed *In Forma Pauperis*  
25 ("IFP") pursuant to 28 U.S.C. § 1915(a) [Doc. No. 4]. This Court granted Plaintiff's Motion to  
26 Proceed IFP but sua sponte dismissed his Complaint as frivolous. (See Sept. 9, 2008 Order at  
27 5-6.) Nonetheless, Plaintiff was granted leave to file an Amended Complaint. (*Id.*) Plaintiff  
28 filed his First Amended Complaint ("FAC") on October 1, 2008.

## 1 II. Sua Sponte Screening per 28 U.S.C. § 1915(e)(2)(B) and § 1915A(b)

2 As the Court informed Plaintiff in its previous Order, the Prison Litigation Reform Act  
 3 (“PLRA”) obligates the Court to review complaints filed by all persons proceeding IFP and by  
 4 those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused of,  
 5 sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or conditions  
 6 of parole, probation, pretrial release, or diversionary program,” “as soon as practicable after  
 7 docketing.” See 28 U.S.C. § 1915(e)(2) and § 1915A(b). Under these provisions, the Court  
 8 must sua sponte dismiss any IFP or prisoner complaint, or any portion thereof, which is  
 9 frivolous, malicious, fails to state a claim, or which seeks damages from defendants who are  
 10 immune. See 28 U.S.C. § 1915(e)(2)(B) and § 1915A; *Calhoun v. Stahl*, 254 F.3d 845, 845 (9th  
 11 Cir. 2001) (“[T]he provisions of 28 U.S.C. § 1915(e)(2)(B) are not limited to prisoners.”); *Lopez*  
 12 *v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (noting that 28 U.S.C. § 1915(e)  
 13 “not only permits but requires” the court to sua sponte dismiss an *in forma pauperis* complaint  
 14 that fails to state a claim); *Resnick v. Hayes*, 213 F.3d 443, 446 (9th Cir. 2000) (§ 1915A).

15 Before amendment by the PLRA, the former 28 U.S.C. § 1915(d) permitted sua sponte  
 16 dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1126, 1130. An action is  
 17 frivolous if it lacks an arguable basis in either law or fact. *Neitzke v. Williams*, 490 U.S. 319,  
 18 324 (1989). However, 28 U.S.C. § 1915(e)(2) and § 1915A now mandate that the court  
 19 reviewing an IFP or prisoner’s suit make and rule on its own motion to dismiss before effecting  
 20 service of the Complaint by the U.S. Marshal pursuant to FED.R.CIV.P. 4(c)(2). See *Calhoun*,  
 21 254 F.3d at 845; *Lopez*, 203 F.3d at 1127; see also *McGore v. Wrigglesworth*, 114 F.3d 601,  
 22 604-05 (6th Cir. 1997) (stating that sua sponte screening pursuant to § 1915 should occur  
 23 “before service of process is made on the opposing parties”); *Barren v. Harrington*, 152 F.3d  
 24 1193, 1194 (9th Cir. 1998) (discussing 28 U.S.C. § 1915A).

25 “[W]hen determining whether a complaint states a claim, a court must accept as true all  
 26 allegations of material fact and must construe those facts in the light most favorable to the  
 27 plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)  
 28 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”; *Andrews*, 398 F.3d at

1 1121. In addition, the Court has a duty to liberally construe a pro se's pleadings, *see Karim-*  
 2 *Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 623 (9th Cir. 1988), which is "particularly  
 3 important in civil rights cases." *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir. 1992). In  
 4 giving liberal interpretation to a pro se civil rights complaint, however, the court may not  
 5 "supply essential elements of claims that were not initially pled." *Ivey v. Board of Regents of*  
 6 *the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

7 As currently pleaded, it is clear, once again, that Plaintiff's First Amended Complaint  
 8 fails to state a cognizable claim under 42 U.S.C. § 1983. Section 1983 imposes two essential  
 9 proof requirements upon a claimant: (1) that a person acting under color of state law committed  
 10 the conduct at issue, and (2) that the conduct deprived the claimant of some right, privilege, or  
 11 immunity protected by the Constitution or laws of the United States. *See* 42 U.S.C. § 1983;  
 12 *Nelson v. Campbell*, 541 U.S. 637, 124 S. Ct. 2117, 2122 (2004); *Haygood v. Younger*, 769 F.2d  
 13 1350, 1354 (9th Cir. 1985) (en banc).

14 Plaintiff's First Amended Complaint, like his original Complaint, contains no  
 15 comprehensible allegations. Instead, Plaintiff seeks to sue "Little RICO" under the "California  
 16 Control of Profits of Organized Crime Act." (*See* FAC at 2.) Plaintiff attaches a number of  
 17 exhibits but there are no factual allegations that correspond with any of these documents. In  
 18 reviewing the First Amended Complaint, the Court finds that there are no factual allegations  
 19 giving rise to any constitutional violation. A complaint is frivolous "where it lacks an arguable  
 20 basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). Here, the Court  
 21 finds Plaintiff's First Amended Complaint to be frivolous under 1915(e)(2)(B) because it lacks  
 22 even "an arguable basis either in law or in fact," and appear "fanciful," "fantastic," or  
 23 "delusional." *Neitzke*, 490 U.S. at 325, 328.

### 24 **III. Conclusion and Order**

25 Good cause appearing, **IT IS HEREBY ORDERED** that:

26 Plaintiff's First Amended Complaint is **DISMISSED** as frivolous pursuant to 28 U.S.C.  
 27 § 1915(e)(2)(B) and § 1915A(b). Moreover, because the Court finds amendment of Plaintiff's  
 28 § 1983 claims would be futile at this time, leave to amend is **DENIED**. *See Cahill v. Liberty*

1 *Mut. Ins. Co.*, 80 F.3d 336, 339 (9th Cir. 1996) (denial of a leave to amend is not an abuse of  
2 discretion where further amendment would be futile); *see also Robinson v. California Bd. of*  
3 *Prison Terms*, 997 F. Supp. 1303, 1308 (C.D. Cal. 1998) ("Since plaintiff has not, and cannot,  
4 state a claim containing an arguable basis in law, this action should be dismissed without leave  
5 to amend; any amendment would be futile.") (citing *Newland v. Dalton*, 81 F.3d 904, 907 (9th  
6 Cir. 1996)).

7 The Clerk shall close the file.

8 **IT IS SO ORDERED.**

9 DATED: 12/17/08

  
HON. IRMA E. GONZALEZ, Chief Judge  
United States District Court